In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1930

WALTER E. JEFFRIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1974. A petition for rehearing was denied on March 25, 1974; and the petition for a writ of certiorari was filed on June 24, 1974. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to deny petitioner's motion for judgment of acquittal based upon the purported inherent unreliability of the one-witness identification.

2. Whether the court of appeals properly concluded that alleged prejudicial remarks of the prosecutor did not amount to reversible error.

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner and a co-defendant were convicted of assault with intent to kill while armed (22 D.C. Code 501, 3202), assault with a dangerous weapon (22 D.C. Code 502), and carrying a pistol without a license (22 D.C. Code 3204). Petitioner was sentenced to a term of imprisonment of thirteen to thirty-nine years on the first count and forty months to ten years on the remaining two counts, the sentences to run concurrently. The court of appeals affirmed in a thorough opinion (Pet. App. A, pp. 4a-14a).

The evidence at trial revealed that on April 15, 1972, Leon Jackson, a cook at the United States Naval Academy, drove from Annapolis, Maryland, to the District of Columbia to visit a friend, Marian Fletcher (T. 242-244). After his arrival that afternoon, Jackson entered a pool hall to use its bathroom.

Once inside the pool hall, Jackson and petitioner became involved in an altercation; one jostled the other, words were exchanged, and petitioner knocked Jackson down with a pool cue and then kicked him several times (T. 244-247). Jackson retreated to his car, took a pistol from the trunk, and returned to the pool hall where he brandished the pistol at petitioner, who promptly fled. As Jackson was leaving the pool hall, he was stopped by the police and arrested for carrying a pistol without a license. He spent the remainder of the weekend in jail (T. 247-249).

On Tuesday, April 18, 1972, Jackson met Miss Fletcher at around 8:00 p.m. and arranged to meet with her again later that evening. When she had not arrived by midnight, Jackson became annoyed and began looking for her to tell her that he was returning to Annapolis (T. 255-256, 260). He soon observed her in an alley parallel to Fourteenth Street, between Wallach Place and T Street (T. 256-258). As he approached her, she made a waving motion as if to indicate that he should go back, but, because of his anger, he ignored her gesture (T. 263). Meanwhile, Jackson saw two men advancing toward him and then passing him, although he paid no particular attention to them (T. 262-264). Suddenly, from behind him, he heard someone call out, "Leon Jackson" (T. 264). As he turned, he saw that both men were pointing pistols at him (T. 264). The shorter of the two men fired one shot, hitting Jackson in the left buttock. The taller of the two then stepped for-

ward and fired, hitting Jackson in the rear of his left elbow, which he had raised in an effort to protect himself (T. 268-269, 326-327, 374-379). Jackson testified that he recognized the taller man as petitioner, the man with whom he had had the previously described altercation in the pool hall (T. 247, 270-272). On cross-examination of Jackson, counsel for petitioner elicited that Miss Fletcher had told him, immediately after the shooting, that petitioner and co-defendant Smith were responsible (T. 333-334, 516).

Two days later Jackson was visited at the hospital by a police officer to whom he gave a detailed description of petitioner as a Negro male in his twenties, about 6'3" tall, weighing 150 pounds, wearing a black leather coat, black boots and gloves (T. 500, 512). Jackson selected a picture of petitioner and one of co-defendant Smith from an array of ten photographs, positively identifying each, and he also indicated the correct nickname of the person in each photograph that he had selected (T. 274-276, 286, 288-289, 483-488). Jackson subsequently identified petitioner and his co-defendant at police lineups (T. 276-277, 293-294, 494, 497).

Petitioner presented an alibi defense. His mother testified that he arrived home on the night in question during the Perry Mason Show, which is on from 11:00 p.m. to 11:30 p.m. (T. 550). She testified that petitioner did not leave the house again that night (T. 552). Petitioner's girl friend corroborated this story (T. 600-603).

ARGUMENT

1. Petitioner apparently contends that Jackson's identification, which was the only eyewitness identification testimony, was so unreliable that the trial court should have entered a judgment of acquittal. This claim is without merit.

It should be emphasized that petitioner raises no due process challenge: he alleges no impropriety or suggestivity with regard to the procedures employed by the police in either the photographic array or the lineup. Rather, his claim of error rests entirely upon a challenge to the credibility of Jackson, based on alleged limitations of his opportunity to observe his assailant during the course of the shooting. Such matters must be resolved by the triers of fact and not by the trial court, the court of appeals or this Court.[1] Absent a claim that the identification was constitutionally infirm, the trial court properly submitted the identification testimony, along with the other evidence, for consideration by the jury at trial. *Russell* v. *United States*, 408 F. 2d 1280, 1285 (C.A. D.C.), certiorari denied, 395 U.S. 928; cf. 18 U.S.C. 3502. The weight or credence to be accorded to Mr. Jackson's testimony was uniquely a jury question. Only if there had been no evidence upon which

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[1] Since in our view no constitutional claim is raised and the matter of whether to submit the challenged evidence to the jury is peculiarly of local concern, this Court ordinarily would not consider the issue. See *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556-557; *Fisher* v. *United States*, 328 U.S. 463, 476.

a reasonable mind might fairly have found guilt beyond a reasonable doubt could the court properly have taken the case from the jury. Such a situation was not presented here.

Assuming *arguendo*, however, that it would have been proper for the trial court to exclude the identification evidence or grant a motion for judgment of acquittal on the basis of its own assessment of the reliability or credibility of the witness Jackson, petitioner's claim is no more substantial. For in evaluating the reliability of an identification, no one criterion is dispositive; rather the test is "whether under the 'totality of the circumstances' the identification was reliable * * *." *Neil* v. *Biggers*, 409 U.S. 188, 199. The factors to be considered include, *inter alia*, the victim's opportunity to observe, his prior description of the criminal, his degree of attention and certainty, and the length of time between the crime and the confrontation. *Id.* at 199-200. Applying these criteria, all of which were thoroughly explored by defense counsel in over one hundred pages of cross-examination of Jackson (T. 295-385, 437-439, 464-469), it is apparent that Jackson's identification of petitioner was not unreliable.

Petitioner had "ample opportunity to observe them [his assailants] during the shooting" (Pet. App. A, p. 11a). The alley was lighted, and he had seen petitioner before (T. 259, 272). He testified that "* * * I heard my name called and I turned around and I recognized both of them. I looked right at them." (T. 271). The fact that the events moved quickly

and the victim only had a "fleeting" look at his assailant is not dispositive. Moreover, petitioner's claim that the medical testimony cast doubt on the victim's ability to observe is inaccurate. The fact that the bullets struck Jackson's left buttock and the rear of his left elbow is not inconsistent with his claim that the first bullet struck him as he was turning and the second hit his elbow when he raised it to protect himself (T. 374-379).

Similarly, petitioner's claim that Jackson "paid absolutely no attention * * * to his assailants" (Pet. 15) is not borne out by the record. Although Jackson testified that he did not pay any attention to them when they initially passed him in the alley, his testimony is clear that he was alerted after they called his name (T. 271) and that he was certain that one of them was the man with whom he had been involved in the fight on the preceding Saturday (T. 272). Moreover, as noted, Jackson had given the police a description of petitioner (T. 500, 512), and the time that elapsed between the crime and his selection of petitioner's picture from a group of ten photographs was only two days[2] (T. 475, 483-484).

In short, we submit that the court of appeals correctly concluded that "[i]t cannot be said * * * that under these circumstances there was a very substantial likelihood of misidentification" (Pet. App. A, p. 11a).

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[2] Approximately a month and a half after the shooting, on June 6, 1972, Jackson identified petitioner at a lineup (T. 276-277, 494).

2. Petitioner also contends that the court of appeals applied an incorrect standard in evaluating instances of alleged prosecutorial misconduct. He states (Pet. 12-13) that the applicable standard is set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 765. However, he claims that the court below did not apply this standard (Pet. 13), but that it "actually established a 'beyond a reasonable doubt prejudice' standard" (Pet. 12). This claim is inaccurate.

In its opinion, the court of appeals stated that the appropriate test for measuring prosecutorial misconduct is (Pet. App. A, p. 8a):

> [W]hether we can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error. [*Gaither* v. *United States*, 134 U.S. App. D.C. 154, 172, 413 F.2d 1061, 1079 (1969) (citations omitted); *Garris* v. *United States*, *supra* at 512.]

The omitted citations indicate that the quoted opinions are in turn quoting from *Kotteakos*; thus petitioner's claim that the court of appeals failed to apply the test of *Kotteakos* is inaccurate.

Moreover, in applying that standard to the instances of alleged prosecutorial misconduct here (Pet. App. A, pp. 7a-10a), we submit that the court below did not err in concluding that "because of the strength of the government's case and because of the

correcting instructions by the trial judge and his commendable effort to keep the prosecutorial misconduct at a minimum, we do not think these alleged errors reached the level of substantial prejudice" (Pet. App. A, p. 11a). See *Donnelly* v. *DeChristoforo*, No. 72-1570, decided May 13, 1974.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.

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